May 16, 2005

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E0400263**

MICHAEL AND PAT HAUKENBERRY
Code Enforcement Appeal

Location: 14528 Southeast 304th Street

Appellant: Michael and Patty Haukenberry, *represented by*
Paul P. Carkeek
Eco Sight
General Delivery
Preston, Washington 98050
Telephone: (425) 222-5662

King County: Department of Development and Environmental Services
represented by **Holly Sawin**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
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SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal with extended compliance dates

EXAMINER PROCEEDINGS:

Hearing Opened:	April 19, 2005
Hearing Closed:	April 19, 2005

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On February 8, 2005, the King County Department of Development and Environmental Services (DDES) Code Enforcement Section issued a Notice and Order to Michael and Patty Haukenberry concerning a 1.1-acre parcel located in the RA-5-SO zone at 14528 Southeast 304th Street. The Haukenberrys and the parcel are cited by the Notice and Order with violation of King County zoning regulations by:

    1. Operation of a mobile crane business from a residential site that exceeds the standards for a home occupation in violation of Section 21A.30.080 of the King County Code. Operation of a mobile crane business in violation of Section 21A.08.060A (construction, trade, warehousing) of the King County Code.

    The Notice and Order required compliance of the property with zoning regulations by cessation of the business operation on the site, or reduction to conform to home occupation standards, no later than March 8, 2005; or, as an alternative, application for and obtainment of a conditional use permit (CUP) for the business as a home industry (CUP consideration pursuant to KCC 21A.08.030(A) and 21A.30.090). Any CUP application was required to have been submitted in complete form by April 15, 2005. If the CUP is denied, removal of the business or conformity to home occupation standards must be achieved within 90 days of the date of CUP denial.

2. A timely appeal of the Notice and Order was filed by the Haukenberrys. Issues raised in the appeal are the following:

    A. Code enforcement in this matter is "unfair or unlawful" because comprehensive plan Policy R-106 was not implemented "as anticipated by Dec. 31, 2001." (The inferred assertion is that proper implementation of the Policy would allow the use on the property outright; see Findings 5-10.)

    B. Enforcement is unjust or unlawful because DDES failed to discourage location of the business on the property, though it had the opportunity to do so after communication from the Appellants regarding their intent.

    C. Enforcement is unlawful because DDES approved a grading and clearing permit expressly associated with the intended home occupation now claimed by DDES to be in violation. (This claim was withdrawn at hearing.)

    D. Enforcement is unjust or unlawful because DDES's related code interpretation (promulgated under file L04CI003) improperly applied more recent code language to the establishment of the business on the property.

    E. DDES unfairly fails to specify in the Notice and Order how the home occupation must be reduced to conform to home occupation standards, or to specify alternative means for the Appellants to achieve code compliance other than by removal of the business or obtainment of a CUP.

F. The Notice and Order confusingly suggests the possibility of a CUP but declares that the operation of the business is in violation of KCC 21A.08.060A.

3. The land use at issue is a family-owned mobile crane service, a business which was established on the site in early 2004 (the Haukenberrys having purchased the property in January 2004). The Appellants operate the business with three current employee equipment operators (originally two on the initial establishment on the property); and an off-site contract-type bookkeeper who picks up and drops off pertinent documents at the site. (A contract-type bookkeeper with an off-site office is not considered an onsite employee of the home occupation in these circumstances.) The crane equipment used in the business consists of three major pieces: a boom truck with a smaller crane, a truck-mounted crane, and an all-terrain crane. Each piece exceeds 2.5 tons in weight. Light maintenance of the equipment is conducted onsite, by the Appellants or employees. Heavy maintenance is conducted offsite (the equipment transported elsewhere). The crane equipment is stored outside on the property.

4. Relevant County zoning regulation amendments were enacted September 27, 2004 by Ordinance 15032, and became effective October 11, 2004.

A. Under the version of the zoning regulations which were in effect upon the establishment of the business on the property in early 2004, as well as the current regulations enacted by Ordinance 15032, a mobile crane business (under the "construction and trade," or "warehousing" (as cited in the Notice and Order) use classifications) is not permitted, either outright or conditionally, in the RA-5-SO zone. [KCC 21A.08.060(A); also see KCC 21A.08.060(B)(34) [1]]

B. The number of employees engaged by the Haukenberrys in their business use on the subject property exceeds the one-employee limit established for home occupation uses, under the current and prior regulations. [KCC 21A.30.080(D)]

C. Under the version of the zoning regulations in effect upon establishment, the area utilized in a home occupation use (whether interior, exterior or a combination of the two) was limited to 20 percent of the floor area of the site residence. By the Ordinance 15032 enactments, the home occupation limitations were liberalized somewhat, with among other things an additional allowance that exterior storage of equipment could be undertaken on an area limited to one percent of the total land area of a property in home occupation use. [KCC 21A.30.080] Given the 1.1-acre size of the property, approximately 479 square feet (or one percent) of the land area of the property may therefore be occupied by exterior storage of equipment in a home occupation use. A 479 square foot space would be fully occupied by the largest piece of crane equipment based on the property by the Appellants, or alternatively by the aggregate of the two smaller pieces; therefore, the total lot coverage of the exterior-stored equipment utilized in the subject business exceeds the land area that may be used for outside equipment storage in a home occupation use.

[1] No other classification for the use which would permit it in that zone is claimed on appeal, and the Examiner finds none apparent in the code.

5. The Appellants essentially stipulate that the business violates the cited regulations, but claim that such regulations should not be enforced as enacted. The essence of the Haukenberrys' first argument of the inappropriateness of the Notice and Order is that the County has failed to properly implement its Comprehensive Plan by not enacting zoning regulations which respect rural economic viability, appropriate rural uses such as cottage industries, and traditional rural occupations. The Appellants contend that such preservation and promotion of rural character and viability are required by the Growth Management Act (GMA), the county-wide planning policies enacted pursuant to the GMA (citing in particular Framework Policy FW-9), and Policy R-106 of the County Comprehensive Plan enacted pursuant to the GMA. The Appellants assert that rural needs have been allowed to "fall through the cracks" as reflected in a recent amendment to Comprehensive Plan Policy R-106 which extends the date for policy implementation to late 2005. The prior and current zoning regulations are also characterized as "deficient," "impossible" for the viability of rural areas, and in violation of the Growth Management Act.

6. The Appellants also argue that the current implementing regulations governing home occupation uses are improperly biased toward urban areas. In fact, the Appellants charge that KCC 21A.30.080 was "never intended" for rural area application.

7. The Haukenberrys make an untimely claim in their brief that the subject business is a valid non-conforming use on the site. Aside from the fact that it is untimely and cannot be formally considered as a defense by the Examiner, there is no showing that the use was legally established on the property when first relocated to it in 2004. The evidence in the record demonstrates that on this property the use was in violation of the prior home occupation regulations as well as now being in violation of the current ones, which as noted are somewhat liberalized.

8. The Appellants also assert that the home occupation regulations at issue do not comport with the purposes cited in KCC 21A.04.060 in establishing the rural zones.

9. The Appellants cite a 2002 Hearing Examiner decision in the matter of *William Bridges/Neal Dubey*, a code enforcement appeal decided May 24, 2002 under file E0001269. The Appellants claim similarity of this case to the *Bridges/Dubey* case, and assert that the Examiner in the *Bridges/Dubey* case decided the matter by respecting similar claims that the rural zoning regulations are improper and inadequate to protect rural viability.

10. The *Bridges/Dubey* case dealt with a long-standing (40-year) forest industry-related use, and the Examiner's consideration of the non-conforming use validity of a remnant use. The Examiner in that case concluded that county policy should be taken into account in deciding the context and extent of non-conforming use rights held by the property.

11. As compatibility is not a test of compliance under the Notice and Order appeal before the Examiner, the Appellants' testimony of the compatibility of their business with surrounding uses and residents cannot sway the Examiner's deliberations in deciding the appeal, except perhaps in deciding an appropriate compliance schedule. Compatibility facts may be valuable in the legislative forum regarding the zoning treatment of the subject use and the greater discussion of rural land use regulation which the Appellants desire to be accelerated and resolved in a more satisfactory fashion, and perhaps in a CUP consideration of a "home industry" application.

12. The Haukenberrys also claim that the Notice and Order is unjust or unlawful because DDES's related code interpretation (promulgated under file L04CI003) improperly applied more recent code language to the establishment of the business on the property. (As noted, the more recent code language is more beneficial to the property's home occupation.) The code interpretation is not directly before the Examiner in this case, and is not binding on the Examiner's consideration of the Notice and Order appeal. The Examiner's consideration of the appeal and the validity of the Notice and Order has taken into account the change in regulations.

13. The Appellants raise complaints about DDES's treatment of the Appellants in their communications with DDES regarding their relocating their business, asserting informal verbal acceptance and also contending that a DDES informational bulletin, Bulletin 43A, regarding home occupation uses which they were given by DDES is misleading and does not cite pertinent code requirements of which the Appellants should have been made aware. The Appellants also complain that the Notice and Order gives no helpful direction to elaborate on its instruction of the compliance alternative to reduce the use on the property so that it conforms to home occupation regulations, and also gives no elaboration of its suggestion that a conditional use permit may be available for the subject use on the property. (As noted above, the conditional use permit possibility is available if the use is considered under the "home industry" use category rather than the "home occupation." [KCC 21A.08.030(A) and 21A.30.090] The violation citation is directed at uses permitted outright.)

CONCLUSIONS:

1. The Examiner cannot concur with the claim of the *Bridges/Dubey* case as precedent. Aside from the fact that prior Hearing Examiner decisions are not binding precedent, the *Bridges/Dubey* case is in any case not directly on point in this consideration. The case at hand involves a very new use established within the last year and a half. As noted above, there is no non-conforming use consideration at issue, since the use was never established legally on the subject property. There is no direct relevance of the *Bridges/Dubey* case to the issues in this case.

2. The issue of GMA, planning policy and comprehensive plan compliance is a matter outside of the Examiner's jurisdiction: claims that the County is in violation of the Growth Management Act in its enactment of comprehensive plans, planning policies, and implementing regulations are legislative matters not under the purview of a quasi-judicial Hearing Examiner.[2] And appeals of the County's legislative enactments under GMA would be under the jurisdiction of the Growth Management Hearing Board (GMHB). In summary, the proper forums for the Appellants' complaints in this regard are the local government legislative authority, the County Council, and/or the GMHB. (The Examiner makes no finding as to whether a formal appeal of the County's past actions in this regard would be timely at this juncture.)

[2] The legislative wisdom of state and county lawmakers must be respected "as is" in deciding the appeal, since policy decisions are the province of the legislative branch. [*Cazzanigi v. General Electric Credit*, 132 Wn. 2d 433, 449, 938 P.2d 819 (1997)] A quasi-judicial decisionmaker cannot substitute the decisionmaker's judgment for that of the legislative body "with respect to the wisdom and necessity of a regulation." [*Rental Owners v. Thurston County*, 85 Wn. App. 171, 186-87, 931 P.2d 208 (1997)]

3. Purpose clauses and preambles are generally of little regulatory effect.[3] The stated individual zone purposes such as in the cited KCC 21A.04.060 are more useful in guiding legislative zoning decisions and regulatory enactments. Here, the Examiner must consider the specific regulations which pertain to the land use at issue, and not whether or not those specific regulations comport with the stated purposes. Again, rectification of any inconsistency or inadequacy of the implementing regulations is a legislative and/or GMHB matter.

4. The complaints about the sufficiency, accuracy and propriety of DDES's information processes are administrative matters under the purview of the Executive Branch. To the extent the complaints raise issues of equity, such as *equitable estoppel* (that the county should be barred from enforcing the matters at hand on equity grounds), or a failure of public duty, they are not matters over which the Examiner has authority. The Examiner as a quasi-judicial hearing officer is generally limited to adjudicating matters under "black letter" law, *i.e*., law enacted in statutory or ordinance form. Washington case law limits the Examiner's exercise of common law in deciding cases. [*Chaussee v. Snohomish County*, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984)] Any equity claim would have to be brought in a court of law.

5. As the mobile crane business in operation on the site is in violation of the home occupation regulations in existence when the use was established on the subject property, and does not benefit sufficiently from the somewhat more liberalized standards enacted effective November 2004, the charge of violation in the Notice and Order is correct and must be sustained.

6. The appeal shall accordingly be denied, except that the deadlines for compliance shall be extended to account for the time taken up by the appeal and to allow a reasonable time for relocation or accomplishment of compliance on the subject property through one of several avenues available to the Appellants. In deciding the amount of reasonable time appropriate, the Examiner can take into account the fact that many in the neighborhood have testified to the compatibility of the use.[4] A six-month time period appears to be reasonable for any necessary relocation, while allowing for the alternative of seeking a conditional use permit for a "home industry" use on the property.

DECISION:

The appeal is DENIED, except that the deadlines for compliance are revised as stated in the following order.

ORDER:

1. Cease operation of the mobile crane business on the subject property or reduce it to full conformity to home occupation standards established by King County Code by no later than November 15, 2005, **OR** apply for and obtain a conditional use permit (CUP) for the mobile

[3] Purpose sections are legally considered mere preamble language in legislation, as declarations of general policy and approach which give a reasoned framework for specific regulations which presumably follow in later sections of a law. They can offer guidance to the interpretation of regulations which are not specific or clear, but cannot be imposed directly themselves. [*Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 580 P.2d 246 (1978), citations omitted]

[4] The Notice and Order notes that a community well on the site has been compromised by equipment washing associated with the business, and the matter is under review by Public Health. The allowance of extended land use compliance in no way limits the enforceability of health or any other operational regulations or covenants.

crane business on the subject property as a "home industry" use pursuant to KCC 21A.08.030(A) and 21A.30.090, according to the following schedule:

Schedule a pre-application meeting by June 15, 2005, submit a complete application by July 15, 2005, and meet pertinent DDES deadlines for required supplementation. If the CUP is denied, operation of the mobile crane business on the property must cease or conform to home occupation standards within six months of the date of denial.

ORDERED this 16th day of May, 2005.

_____

Peter T. Donahue, Deputy
King County Hearing Examiner

TRANSMITTED this 16th day of May, 2005 via certified mail to the following:

Michael & Pat Haukenberry
14528 SE 304th St.
Kent, WA 98042

Paul P. Carkeek
Eco Sight
General Delivery
Preston, WA 98050

TRANSMITTED this 16th day of May, 2005, to the following parties and interested persons of record:

Paul Carkeek
Eco-Sight
General Delivery
Preston WA 98050

Michael & Pat Haukenberry
14528 SE 304th St.
Kent WA 98042

Brian Koehmstedt
308 - 148th Ave. SE
Kent WA 98042

Yelnea Paulenko
30245 - 148th Ave. SE
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Jerry Purdum
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Suzanne Chan
DDES, Code Enf.
MS OAK-DE-0100

Elizabeth Deraitus
DDES/LUSD
Code Enf. Supvr.
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Erroll Garnett
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Patricia Malone
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Holly Sawin
DDES/LUSD
Code Enf. Section
MS OAK-DE-0100

Fred White
DDES/LUSD
Site Development Services
MS OAK-DE-0100

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly

commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE APRIL 19, 2005, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0400263.

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin, Fred White and Erroll Garnett, representing the Department; Paul P. Carkeek representing the Appellants, Pat Haukenberry, Jerry Purdum, Brian Koehmstedt and Yelnea Paulenko.

The following Exhibits were offered and entered into the record:

Exhibit No. 1 DDES Staff Report
Exhibit No. 2 Copy of the Notice and Order issued on February 8, 2005
Exhibit No. 3 Copy of the Appeal received on February 25, 2005
Exhibit No. 4 Copy of codes cited in the Notice and Order
Exhibit No. 5 Copy of the request for code interpretation, submitted by Mr. Carkeek on behalf of Mr. & Mrs. Haukenberry dated September 3, 2004
Exhibit No. 6 Letter to Paul Carkeek from Harry Reinert dated November 16, 2004 in regard to code interpretation L04CI003
Exhibit No. 7 Photographs (4) taken by Holly Sawin on March 31, 2005
Exhibit No. 8 Letter to Mike & Patty Haukenberry from David Koperski, Health Department dated June 16, 2004
Exhibit No. 9 Email to Holly Sawin from David Koperski dated April 4, 2005
Exhibit No. 10 Map depicting the four residences served by the community well located on the Haukenberry property
Exhibit No. 11 Photographs (2) taken by Holly Sawin on April 7, 2005
Exhibit No. 12 Mr. Carkeek's brief with attachments
Exhibit No. 13 Code excerpts, county-wide policies in effect now, rural legacy
Exhibit No. 14 Hearing Examiner Report and Decision on E0001269 - William Bridges/Neil Dubey Dated May 24, 2002
Exhibit No. 15 *No exhibit offered*
Exhibit No. 16 News from the Council News Release dated July 20, 2004; Proposed Amendments to Comprehensive Plan Update Protect Character of Rural Areas, Working Farms, And Forests
Exhibit No. 17 Chair's Striking Amendment dated July 20, 2004
Exhibit No. 18 Email to Steve Hammond from Kevin Wright dated December 23, 2004
Exhibit No. 19 Superior Court Ruling dated September 19, 2000 regarding the process for interpretations
Exhibit No. 20 Final Code Interpretation dated July 23, 2003 regarding home occupation being germane to keeping heavy equipment
Exhibit No. 21 Page from DDES file on the initial investigation of the Haukenberrys

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